NO. 47831-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SHERRY L ESCH,

Appellant

v.

SKAMANIA COUNTY PUBLIC UTILITY DISTRICT #1;
and CLYDE D. LEACH,

Respondents

RESPONSE BRIEF OF SKAMANIA COUNTY PUD

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I. INTRODUCTION

After then Skamania County PUD Commissioner Clyde Leach[1] ("Leach") actively supported Judith Lanz's election campaign against his fellow PUD Commissioner Curt Esch in 2011, Commissioner Esch's wife, Sherry Esch ("Plaintiff" or "Esch"), made a broad Public Record Act ("PRA") request to the Skamania County PUD ("PUD") for Leach's communications on his person computer, including any communications concerning her husband's opponent Lanz. When Leach refused to allow an independent search of his personal computer – as demanded in the request – Esch sued both the PUD and Leach.

The PUD and Leach promptly moved to dismiss Leach, but the Esch objected, claiming Leach was a necessary party. The Court denied the motion, at which point the PUD determined Leach needed separate counsel. Because Esch sued Leach for action taken in his official capacity, the PUD was obligated pay for this attorney.

After 18 months of expensive litigation, Leach filed a summary judgment motion, asserting that his constitutional privacy rights prohibited the PUD or the Court from forcing the independent search of his personal computer, as demanded by Esch.

[1] During this lawsuit, Commissioner Esch chose not to seek re-election and thus became a former PUD Commissioner on January 1, 2015.

The trial court agreed and entered a summary judgment order dismissing Leach. The PUD, which continues to have the obligation of funding Leach's defense, asks this Court to affirm.

Not only does the Supreme Court's ruling in *Nissen v. Pierce County* confirm that an agency cannot force the independent search Esch demanded, but the plain language of the PRA itself only allows PRA claims against agencies, not individuals. Thus, Leach has never been a proper party in this lawsuit, and the trial court was correct when it addressed this issue a second time and dismissed Leach from this lawsuit.

II. RESTATEMENT OF ISSUES ON APPEAL

1. Does the Public Records Act authorize agencies to search the private devises of employees and elected officials if those employees or officials use a personal device to maintain public records?

2. Does the Public Records Act authorize claims against individual employees or elected officials?

III. STATEMENT OF THE CASE

A. Two Sides to the Story

To affirm the trial court's order dismissing Leach, this Court need only address a narrow issue that turns on a question of statutory interpretation: is an elected official a proper defendant in a PRA lawsuit? The underlying facts in the case are therefore largely irrelevant.

Esch, however, spends most of her brief telling a very one-side version of the underlying dispute in her "statement of the case." Her summary mirrors her recitation of the facts in her summary judgment motion,[2] which the Court denied because "[q]uestions of fact remain considering all of the grounds Plaintiff asserts justify summary Judgment."[3] But because those contested facts are irrelevant for the purpose of the appeal, the PUD will not waste the Court's time refuting them point by point and instead refers the Court to the PUD's memorandum in opposition to summary judgment, if the Court is interested.[4] Here, the PUD will simply summarize a few uncontested facts and procedural facts that relate to the appeal.

In the 2011 election cycle, former Commissioner Leach and the former PUD General Manager actively supported a candidate running against Plaintiff Esch's husband, PUD Commissioner Curt Esch.[5] After her husband was re-elected, Plaintiff Esch made a broad PRA request, seeking amongst other records, all communications on Leach's personal computer between Leach and her husband's former opponent.[6] In that

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[2] CP 247-81.

[3] CP 4.

[4] See Supplemental Designation of Clerk's Papers, Docket Item 58, "Opposition to Plaintiff's Cross-Motion for Partial Summary Judgment."

[5] CP 1181 (Ken Woodrich Dep. at 211:10-24).

[6] CP 13-14 (seeking all emails with "Judith Lanz").

request, she also sought to have an independent search conducted of Leach's personal computer.[7]

B. Esch Sues the PUD and Leach

Almost exactly one year after the PUD informed Plaintiff Esch that it could not produce the records located exclusively within Leach's personal possession, Plaintiff Esch filed a lawsuit against the PUD and Leach.[8] After filing suit, Plaintiff Esch made it clear she would only settle with the PUD if the PUD did not pay for Leach's defense costs[9]:

> Third, while we sued Mr. Leach in his official capacity (Ms. Esch wanted to avoid having the same burdens placed on him that were placed on her family as a result of previous lawsuit), we don't believe public funds can or should be used to defend Mr. Leach's refusal to turn over public records. As far as we know, Commissioner Leach has never denied that he is in possession of public records. He is therefore not entitled to indemnification under the RCW 4.96.040.
>
> As you know, the statute allows a public official to seek indemnification from the agency if he or she has been sued "for damages." The Indemnification Statute also requires approval by the local agency. Because Commissioner Leach is not being sued for damages, and because his position is contrary to the interest of the PUD or the public, he is not entitled to have public funds used to defend him in this lawsuit.
>
> Also remember that Commissioner Esch has been forced to hire a lawyer on several occasions in connection with his duties as a commissioner (i.e. to protect against a public records request filed by the former Auditor's attorney, a criminal investigation filed by Bob Wittenberg and supported by Commissioner Leach, a retaliation lawsuit in which the Plaintiff's attorney issued a broad subpoena to Sherry to produce documents and to testify at a deposition and finally a whistleblower complaint). Despite Commissioner Leach's repeated requests, you and the other commissioners have repeatedly refused to allow him to be reimbursed for his legal fees. So imagine the backlash if you and/or the PUD decide that Commission Leach is entitled to use public funds to defend against Sherry's lawsuit.

[7] See, e.g., CP 13, 441.

[8] CP 1-12.

[9] CP 424-25 (August 23, 2013 settlement letter from Plaintiff Esch's attorney to the PUD's general counsel).

Despite Plaintiff Esch's demand, the PUD determined it was obligated to defend Leach. At first, the PUD's general counsel represented both the PUD and Leach and moved to dismiss Leach as a defendant, asserting that the Public Records Act only provides for claims against agencies, not individual employees or officials.[10] Plaintiff Esch opposed the motion, claiming Leach was a "necessary party" because he was in possession of the requested records.[11]

The Court denied the motion. Although no written order was ever entered, the Trial Court explained his reasoning for denying the motion to dismiss in the summary judgment order at issue in this appeal:

> The Court previously denied a motion to dismiss Dr. Clyde Leach from this case based on plaintiff's assertion that Dr. Leach was a necessary party, based on the relief Plaintiff sought, which was an independent review of Dr. Leach's computer for records related to the conduct of the PUD, and an ordered production of those records, at least for in camera review.[12]

In the demand letter Esch's attorney sent the PUD at the outset of the lawsuit, Esch asserted that the PUD was required to obtain the records from Leach, even if this meant the PUD had file a replevin action against Leach.[13] Thus, once it became certain that Leach would remain in this

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[10] CP 41.

[11] CP 67-71.

[12] CP 1584 (Combined Order on Summary Judgment Motions ("SJ Order") at 5:8-12).

[13] CP 424.

lawsuit, the PUD's general counsel determined that Leach would need his own attorney, as the PUD's interest and Leach's interest were not completely aligned. And because Esch sued Leach for actions taken in his official capacity, the PUD determined that its obligation to defend Leach required the PUD to pay for Leach's independent attorney.[14]

After extensive discovery, the PUD, Leach and Esch each filed summary judgment motions.[15] The Court denied the PUD's motion and denied Plaintiff Esch's motion, but granted Leach's motion and dismissed him from the case.[16]

The trial court's reason for dismissing Leach is directly linked to the Court's earlier denial of the motion to dismiss. As indicated, Plaintiff Esch was seeking an independent search of Leach's personal computer[17] and therefore had argued Leach was a necessary party – presumably because she believed the PRA authorized the trial court to order this independent search.[18]

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[14] *See* RCW 54.16.097 & RCW 4.96.041; *see also* CP 428 (letter from attorney making an appearance on behalf of Leach); Supplemental Designation of Clerk's Papers, Docket Item s 18 & 19 "Note of Appearance" and "Notice of Substitution of Counsel".

[15] CP 105-124 (Leach motion); CP 175-209 (PUD motion); CP 246-281 (Esch motion). Note, the PUD and Leach originally filed summary judgment motions in the spring 2014, but the trial court granted Esch's CR 56(f) motion, so the PUD refiled a modified motion in February 2015, but Leach simply re-noted his original motion.

[16] CP 1580-84.

[17] *See, e.g.*, CP 441 (Letter for Esch's Attorney) ("We also demand that Dr. Leach arrange for someone to review his computer to retrieve any other documents that may be response ... to Sherry's public records request.").

[18] CP 1584 (SJ Order at 5:8-12).

The trial court dismissed Leach after concluding that "the PRA does not currently give the Court the authority to order a third party to look into an official's private home computer."[19] In other words, the PRA did not authorize the relief Esch was seeking, so Leach was not a necessary party.

The trial court never declared any portion of the PRA "unconstitutional." The trial court's statements that the state and federal constitutions "trump the PRA" are best understood as a hypothetical conclusion – if Esch was right that the PRA authorized an agency to conduct a nonconsensual search of an employee's private computer, then that authority in the PRA would be trumped by the privacy protections in the state and federal constitution. Of course, in *Nissen*, the Supreme Court ruled that the PRA did not give agencies or courts any such authority, and thus the trial court's hypothetical remains just that – a hypothetical.

After dismissing Leach, the trial court certified that ruling for immediate review.[20] Esch then filed her notice of appeal.

[19] CP 1584 (SJ Order at 5:13-15).

[20] The trial court also denied Plaintiff Esch's motion to enforce an aborted settlement agreement, but the PUD takes no position on that issue.

IV. ARGUMENT

A. Summary of Argument

The PRA only provides for two causes of action for alleged violations, and only allows those claims to be asserted against an "agency." The use of the term "agency" is significant because the PRA clearly distinguishes throughout the Act between an agency on one hand and individual employees and officials on the other. This distinction was even more prominent when the PRA was part of the former Public Disclosure Act ("PDA"), because the PDA did allow actions against individual officials, but only for campaign finance violations, not public records violations. Finally, the Courts have already held that the term "agency" does not include individual employees or officials for the purpose of awarding attorney fees and penalties. The plain language of the PRA compels the conclusion that a requestor cannot maintain a PRA claim against an individual elected official. Therefore the trial court's order dismissing former Commissioner Leach must be affirmed.[21]

[21] As a defendant in the underlying case, the PUD has standing to file a response brief in this case. *See Ackerley Communications, Inc. v. City of Seattle*, 92 Wn.2d 905, 919 n.2, 602 P.2d 1177 (1979). Moreover, the PUD has standing because it has a significant financial interest in the outcome of this appeal. *See, e.g., State ex rel. Graham v. Northshore School Dist. No. 417*, 99 Wn.2d 232, 242-43, 662 P.2d 38 (1983) (standing based on financial interest in outcome).

B. Standard of Review

Whether former Commissioner Leach is a proper defendant in a PRA claim turns on a question of statutory interpretation. Questions of law, including questions of statutory interpretation, are reviewed de novo. *Rental Housing Ass'n v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009).

Although the trial court's summary judgment order does not explicitly address the issue of whether the PRA authorizes claims against an individual elected official, this conclusion is implicit it the trial court's summary judgment ruling. Nevertheless, even if this had not been the basis of the trial court's ruling dismissing Leach, that dismissal can be affirmed "on any grounds established by the pleadings and supported by the record." *Rash v. Providence Health & Servs.*, 183 Wn. App. 612, 630, 334 P.3d 1154 (2014), *review denied*, 182 Wash. 2d 1028 (2015).

C. *Nissen* Confirms that the PRA Does Not Allow an Agency to Violate an Individual Elected Official's Personal Constitutional Privacy Rights

The trial court dismissed former Commissioner Leach after determining that "[t]here is literally nothing that gives the Court authority under the PRA to breach these constitutional protections absent

constitutional language in the PRA creating some kind of waiver for public employees[.]"[22]

The Supreme Court agreed with this conclusion in *Nissen v. Pierce County*, 183 Wn.2d 863, 887, 357 P.3d 45 (2015). In that case, like this case, the plaintiff sought to force an independent search of an elected official's private electronic device for public records. The Supreme Court rejected that claim, ruling: "The people enacted the PRA 'mindful of the right of individuals to privacy,' Laws of 1973, ch. 1, § 1(11), and individuals do not sacrifice all constitutional protection by accepting public employment." *Nissen*, 183 Wn.2d at 887. The Court went on to rule that the PRA did not authorize such a search, and that an agency could comply with its obligations if the elected official conducted a search and provided any responsive records to the agency to be produced. *Nissen*, 183 Wn.2d at 886.

While the Court's ruling in *Nissen* resolves this issue, the trial court's constitutional ruling was still correct. A person has a constitutional privacy right in a personal computer. *See Riley v. California*, -- U.S. --, 134 S.Ct. 2473, 2493 (2014) (ruling police must have a warrant to search personal electronic devices because such devices contain personal private papers); *State v. Nordlund*, 113 Wn. App. 171,

[22] CP 1584 (SJ Order at 5:19-21).

181-82, 53 P.3d 520 (2002) (recognizing constitutional privacy right in a personal computer). Elected officials and constituents also have a First Amendment associational privacy right in at least some of their electronic communications. *Eugster v. City of Spokane*, 121 Wn. App. 799, 808, 91 P.3d 117 (2004) (correspondence between elected official and constituent presumed to be protected by associational privacy); *see also State v. Hinton*, 179 Wn.2d 862, 877, 319 P.3d 9 (2014) (recognizing associational privacy right in personal communications).

"[T]he important policy of public disclosure of information relating to the performance of public officials cannot encroach upon the general personal privacy rights to which every citizen is entitled." *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). Therefore, when someone chooses to work for a government agency, they do not lose their constitutional privacy rights. *Robinson v. City of Seattle*, 102 Wn. App. 795, 821, 10 P.3d 452 (2000) (applying Art. 1, Sec. 7); *City of Ontario v. Quon*, 560 U.S. 746, 756 (2010) (applying Fourth Amendment). That same is true for elected officials. *Nissen*, 183 Wn.2d at 887 (citing *Quon*).

When a government entity orders a person to search their own papers and then produce those papers for government inspection, a "search" in the constitutional sense occurs under the Fourth Amendment. *City of Los Angeles v. Patel*, -- U.S. --, 125 S.Ct. 2443 (2015) (statutory

requirement that business owners to turn over business records to police on demand was an illegal search under the 4th Amendment); *Seymour v. State*, 152 Wn. App. 156, 167, 216 P.3d 1039 (2009) (illegal search occurred when business owner ordered to turn over records); *see also Delia v. City of Rialto*, 621 F.3d 1069, 1077 (9th Cir. 2010) (city violated employee's privacy right by compelling him to remove an item from his home so it could be inspected by the city attorney), *rev'd in part on other grounds sub nom., Filarsky v. Delia*, -- U.S. --, 132 S.Ct. 1657 (2012).

Because personal computers are protected by privacy rights under Article 1, Section 7 and the Fourth Amendment, government must have a warrant or other "authority in law" to conduct a nonconsensual search of an employee's or elected official's personal computer. *See Robinson*, 102 Wn. App. at 821. For a statute to qualify as "authority of law," it must expressly authorize the search and must provide protections including an independent magistrate who authorizes the search after applying reasonable criteria. *State v. Miles*, 160 Wn.2d 236, 248, 156 P.3d 864 (2007) (search warrant "is not authority of law simply because it is authorized by a statute"); *City of Seattle v. McCready*, 123 Wn.2d 260, 272, 868 P.2d 134 (1994) (search authority must be expressly provided by statute to qualify as "authority of law"). When no such valid statutory authority exists, and a government employer seeks to compel an employee

to conduct a search and allow the employer to inspect the product of that search, the government employer violates the employee's constitutional privacy rights. *See, e.g.*, *Delia*, 621 F.3d at 1077.

The PRA does not contain any express provision that authorizes an employer to search an employee's personal computer. Nor does it provide for any procedure where such a search could be authorized by a neutral magistrate. Finally, there are absolutely not standards that a magistrate could apply to ensure the search demand was reasonable. Thus, if the PRA had been construed to include the implicit authority for employers to seize and search an elected official's personal computer for public records, that authority would be unconstitutional. In other words, the constitutional privacy rights of the official would trump that implicit authority if it existed in the PRA.

But *Nissen* makes it clear there is no such authority in the PRA for the constitution to trump. Thus, the Court need not rule on the trial court's legally correct assessment of privacy rights.

D. Individual Elected Officials Cannot Be Sued for Violating the PRA

The issue that this Court must address on appeal – "whether an elected official is independently subject to the PRA[.]" – is an "unsettled question" that was not resolved by the Supreme Court *Nissen*. *See Nissen*,

183 Wn.2d at 485 n.6. While this question may be unsettled, this Court need only look to the plain language of the PRA to answer it.

1. The Plain Language of PRA Only Imposes Enforceable Obligations on Agencies

The plain language of the PRA distinguishes between agencies and its employees and officials and only authorizes claims for violations against agencies, not individuals.

Courts use the standard tools of statutory construction when interpreting the PRA. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 606, 963 P.2d 869 (1998). Courts should give effect to the plain meaning to the provisions in the PRA when those provisions are clear. *Zink v. City of Mesa*, 162 Wn. App. 688, 709,256 P.3d 384 (2011). Courts should look at the act in its entirety and construe its provisions in harmony with each other. *Ockerman v. King County*, 102 Wn. App. 212, 216, 6 P.3d 1214 (2000). When interpreting the PRA, the Court may also apply the maxim that "to express one thing in a statute implies the exclusion of the other." *West v. Thurston County*, 168 Wn. App. 162, 183, 275 P.3d 1200 (2012). For example, the Supreme Court ruled that "courts" were not "agencies" because the definition of "agency" identified numerous examples of what qualify as agencies and courts were not listed in the definition. *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986).

The plain language of the PRA mandates that the Court find that an individual person is not an "agency." First, the definition of "agency" and "person" compel a finding that persons are not agencies. Just as the definition of "agency" does not list "courts," it also does not include any reference to individual officials; rather "agencies" are included in the definition of "person." *Compare* RCW 42.56.010(1) (defining agency) *with* RCW 42.17A.005(35) (defining person).[23] Thus, if an agency is a subset of a "person," then persons are not a subset of agencies.

In addition to the clear distinction in the definitions between an agency and a person, the PRA contains numerous examples where the plain language expressly distinguishes between an "agency" on one hand and individual "person" (whether employees or officials or private persons). For example, the disclaimer of liability provision provides immunity to the "public agency, public official, public employee, or custodian[.]" RCW 42.56.060. Employees and officials are also distinguished from agencies in several exemptions. *See, e.g.*, RCW 42.56.230(3) ("information in files maintained for employees, appointees, or elected officials of any public agency").

[23] The legislation that recodified the public records provisions in the former Public Disclosure Act expressly incorporated the definitions that remained in the PDA. Laws of 2005, ch. 274 §101 ("The definitions in RCW 42.17.020 apply throughout this chapter."). The definitions in former RCW 42.17.020 were subsequently recodified into ch. 42.17A RCW. See Laws of 2010, ch. 204 §101.

Most importantly, the PRA distinguishes between individual employees and officials on one hand and the agency on the other in the two provisions that provide to cause of actions. First, in the "reverse" cause-of-action provision in RCW 42.56.540, the PRA makes the distinction when identifying who can bring a reverse PRA action: "agency or its representative or a person who is named in the record[.]" Second, in the requestor cause-of-action provision in RCW 42.56.550 – entitled "Judicial review of agency action" – the provisions expressly distinguishes between the agency itself and public officials of that agency but only authorizes claims against agencies:

> (1) ... the superior court ... may require the responsible **agency** to show cause ....
>
> (2) ... the superior court ... may require the responsible **agency** to show that the estimate it provided is reasonable. ...
>
> (3) Judicial review of all **agency actions** ... even though such examination may cause inconvenience or embarrassment to **public officials** or others. ...
>
> (4) Any person who prevails against an **agency** in any action ....

RCW 42.56.550 (emphasis added).

"It is an elementary rule that where certain language is used in one instance, and different language in another, there is a difference in legislative intent." *Seeber v. Wash. State Public Disclosure Comm'n,* 96 Wn.2d 135, 139, 634 P.2d 303 (1981) (interpreting the former PDA).

Because the PRA consistently makes distinctions between an agency on one hand and its employees and officials on the other hand, it is "elementary" that an individual elected official is not an "agency." And because the PRA only allows claims against agencies, not individual elected officials, it is equally elementary that only agencies can be sued. Any other interpretation would make the PRA's careful distinction between the agency and its employees and officials meaningless. A Court interpreting the PRA "must give effect to all the language used so that no portion is rendered meaningless or unnecessary." *Cornu-Labat v. Hosp. Dist. No. 2*, 177 Wn.2d 221, 231, 298 P.3d 741 (2013). Thus, the PRA's careful distinction between agencies and persons must be given meaning. This means that when the PRA provides that agencies can be sued, it means individuals such as Leach cannot.

2. The Former PDA Allowed Actions Against Individual Officials, but Only for Campaign Finance Disclosure Claims, Not Public Records Claims

The conclusion that an individual elected official cannot be sued for violating the PRA is further enforced when the language of the original initiative – I-276 (1972) – that adopted the public records provision is analyzed. The meaning of the provisions of the PRA can be determined by considering "the context of the statute where that provision is found, related provisions, and the statutory scheme as a whole." *Bainbridge Is.*

Police Guild v. City of Puyallup, 172 Wn.2d 398, 421, 259 P.3d 190 (2011); *see also Fisher Broadcasting v. City of Seattle*, 180 Wn.2d 515, 527, 326 P.3d 688 (2014) ("In determining the plain meaning of a statute, we consider all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question").

The public records provisions of I-276 were enforced through Section 34 of the initiative, which was entitled "Judicial review of agency action." The other provisions of the Act, however, were enforced through Section 39 "Civil remedies and sanctions" and Section 40 "Enforcement." While Section 34 only referred to enforcement against an "agency," Second 39 and 40 allowed for enforcement against "candidates" (§39(1)(a)), "lobbyists" (§39(1)(b)), or "persons" (§§39(1)(c)-(f) & §40). By providing for different remedies in different circumstances, it is "elementary" that the intent of the law was to limit when certain remedies could be brought against specified violators. *See Seeber*, 96 Wn.2d at 139 (because PDA only allowed for broad subpoenas against candidates and for limited subpoena authority against lobbyists, a broad subpoena against a lobbyist could not be enforced).

Thus, when originally enacted, the PDA only allowed requestors to sue agencies for violating the public records provisions. While the PRA has been amended countless times since 1973 and was recodified in 2005,

the enforcement provisions from Section 34 remain unchanged in RCW 42.56.550, except for an increase in the daily penalty amount. Thus, this Court must interpret RCW 42.56.550 as having the same meaning it had in 1973, when it unambiguously only allowed requestors to sue agencies to enforce the public records provisions.

Thus conclusion is supported by the Court of Appeal's analysis the PDA's enforcement provisions in *Crisman v. Pierce County Fire Protection District*, 115 Wn. App. 16, 24, 60 P.3d 652 (2002). In that case, the plaintiff asserted that in addition to the express provisions that allowed the state, or a person acting in the name of the state, to enforce the campaign provisions, there was also an implied private cause of action for a losing candidate who claimed the incumbent has used public resources to support the re-election efforts. Based on the specificity of the enforcement provisions in the law, however, the court found that no implied cause of action existed: "the various remedies [former] RCW 42.17.390 [codifiying I-276 §§39 & 40] authorize suggest that the legislature intended not to create private causes of action to enforce the code, ... We conclude that [former] chapter 42.17 RCW does not imply a private cause of action." *Crisman*, 115 Wn.App. at 24.

This Court should apply the same reasoning applied in *Crisman* to find that by including specific enforcement provisions against agencies for

the public records provisions, the drafter of I-276 did not intent to authorize requestors to sue elected officials such as Leach for public records violations.

3. The Courts Have Held that Individuals Are Not Agencies and thus Cannot Be Required to Pay Attorney Fees Under RCW 42.56.550(4)

Given the clear distinction in the PRA between an agency and an individual, it is not surprising that courts have uniformly held in "reverse" PRA actions that persons are not agencies when interpreting the attorney fee provision in RCW 42.56.550(4).

"Reverse" PRA actions are brought under RCW 42.56.540 and can be filed by the agencies themselves or by individuals. When an agency files a "reverse" PRA claim and loses, the Courts have held that the requestor is entitled to attorney fees and penalties under RCW 42.56.550(4). *Soter v. Cowles Pub'g Co.*, 162 Wn.2d 716, 750-51, 174 P.3d 60 (2007). But when an individual files a reverse PRA claim, even if that individual is an agency employee or official, the courts has held that attorney fees and penalties cannot be awarded under .550(4); that section is "inapplicable" based on its plain language because "an individual—rather than the agency—oppose[d] disclosure of the records[.]" *Tiberino v. Spokane County*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000) (citing *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 757, 958 P.2d 260

(1998) and *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 329, 890 P.2d 544 (1995)); *see also Morgan v. City of Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009) (elected judge).

The fact that an individual is not an agency under .550(4) is so well established that in one case, the Court of Appeals affirmed the imposition of Rule 11 sanctions against a requestor's attorney for arguing that attorney fees should be awarded under that provision in a reverse PRA action filed by individuals. *See Bellevue John Does v. Bellevue School Dist.*, 129 Wn. App. 832, 864, 120 P.3d 616 (2005), *rev'd in part on other grounds*, 164 Wn.2d 199, 189 P.3d 139 (2008). The Court first noted that only "[a] party who 'prevails against an agency'... is entitled to an award of costs including reasonable attorney fees[.]" *Bellevue John Does*, 129 Wn. App. at 864 (quoting former RCW 42.17.340(4), now codified at RCW 42.56.550(4)) (emphasis added). The Court then concluded that "[i]nterpreting the attorney fees provision to be inapplicable in legal actions when an individual rather than an agency opposes disclosure is consistent with the purpose of the attorney fees provision[.]" *Bellevue John Does*, 129 Wn. App. at 866 (quotation omitted).

While those cases involved "reverse" PRA claims, rather than a requestor-initiated claim, the courts in those cases were interpreting the term "agency" in RCW 42.56.550. Statutory terms are no "chameleons"

that change from lawsuit to lawsuit. *Clark v. Martinez*, 543 U.S. 371, 382 (2005) (holding court was bound by its earlier interpretation of a statute, even though the earlier cases involved constitutional issues not present in the current case). Thus, if an individual is not an "agency" under subsection 4 of RCW 45.56.550 in "reverse" PRA actions, then individuals cannot be "agencies" under subsection 4 in requestor lawsuits. And if individuals are not "agencies" under subsection 4 in requestor suits, then individuals cannot be agencies under subsection 1 and 2, which only authorize claims against agencies.

4. The Trial Court Properly Dismissed Leach Because Only Agencies, Not Individual Elected Officas, Can Be Sued for PRA Violations

Given the plaint language of the PRA, its legislative history, and the courts' interpretation of "agency" in related context, this Court should answer the "unsettled" question in *Nissen* and rule that an individual, even an individual elected official, cannot be sued for violating the PRA. Accordingly, the Court should affirm the trial court's order dismissing Leach.

E. Esch Is Not Entitled to Attorney Fees

However the Court rules on this appeal, Esch is not entitled to an award of attorney fees. First, any fees incurred arguing the settlement agreement issue has nothing to do with the PUD and cannot justify an

attorney fee award. Second, even if the Court reversed the dismissal of Leach, it would not be ruling that the PUD has wrongfully withheld records. Thus, an order of attorney fees would be premature. *See O'Neill v. City of Shoreline*, 170 Wn.2d 138, 152, 240 P.3d 1149 (2010) (court of appeals erred in awarding attorney fees when reversing dismissal of case because there had not been any finding that records were wrongfully withheld).

V. CONCLUSION

This case presents a significant issue for agencies and agency employees and officials. PRA lawsuits are expensive to defend. In cases like this, where the records at issue are located on an official's personal computer, the agency's interest and the official's interest will often differ, meaning that the agency attorney may not be able to represent both parties. Thus, if plaintiffs can sue the agency and individual, either the agency will have to hire a second attorney, or the individual will have to hire their own attorney. This not only drives up the costs for the taxpayers and ratepayers, but it allows political enemies to impose significant costs on elected officials. Thus it would allow the PRA to be used as a political weapon against individuals.

The PRA was enacted to scrutinize the conduct of government, not individuals. One way the drafters of the PRA maintained this dichotomy

was only to allow lawsuits against agencies, not individuals. This Court should therefore resolve the "unsettled" question and affirm the trial court's order dismissing former Commissioner Leach as a defendant.

RESPECTFULLY SUBMITTED this 8th day of February, 2016.

By:_____
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Attorney for Skamania County PUD
No. 1

CERTIFICATE OF SERVICE

I, Ramsey Ramerman, certify under penalty of perjury that true and correct copies of the above attached document were emailed to the parties below pursuant to prior agreement:

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Executed at, Washington, this 8th day of February, 2016.

Ramsey Ramerman